

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

STEPHEN JOSEPH WALKER,

Defendant

)
)
)
)
)
)
)
)
)

Criminal No. 89-00013 P

RECOMMENDED DECISION ON MOTION TO SUPPRESS

On February 15, 1989 the grand jury charged the defendant in a single-count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. ' ' 922(g)(1) and 924(a)(1). The defendant has filed a motion to suppress the evidence obtained as a result of a stop on August 19, 1987 at approximately 2:30 a.m. in Westbrook, Maine. An evidentiary hearing was held before me on January 16, 1990. The deadline for filing reply memoranda was February 9, 1990. I recommend that the following findings of fact be adopted and that the motion to suppress be ***DENIED***.

Proposed Findings of Fact

At approximately 9:00 p.m. on August 18, 1987 Thomas Christman and the defendant, Christman's employee, pulled up to C.R. Wood, a lumber and building supply company located at the intersection of East Bridge Street and Route 302 in Westbrook, Maine, in a tractor-trailer rig loaded with wood for delivery. They found the company closed. After positioning the rig in front of the yard

gate which was located to the side of the building, they detached the trailer from the cab, secured the load and left to get something to eat. They returned shortly before 2:30 a.m.

Within minutes of their return, Westbrook patrol officer Stephen Lyons, who was alone on routine patrol in his cruiser, observed the detached trailer and cab in C.R. Wood's dimly lit parking lot. Having patrolled the same area for four years, Officer Lyons was aware that numerous early morning burglaries had taken place in this generally rural part of Westbrook and that C.R. Wood itself had in the past been burglarized. He also knew that C.R. Wood was open between the hours of 7:00 or 8:00 a.m. and 5:00 or 6:00 p.m. In his experience he had never observed any delivery of product to C.R. Wood after hours. He decided to investigate.

When he pulled onto the C.R. Wood premises and as he was driving around the lot, Officer Lyons observed the defendant sitting against the building near the fenced yard area and some movement by another individual in the cab of the truck. The defendant, upon standing, appeared to Officer Lyons to be close to 7 feet in height, approximately 400 pounds in weight and somewhat scruffy looking with greasy hair. The defendant acknowledges himself to be 6 feet 9 inches and, at the time in question, about 350 pounds. As Officer Lyons turned around and came back into the C.R. Wood parking lot he communicated by radio with the police dispatcher to indicate that he was going to stop two suspicious people at that facility. The fact that the trailer was unhitched from the cab and the rig bore out-of-state plates caused him to be concerned that a possible burglary or act of pirating was in progress. He also had concern for his personal safety which derived from his past experience arresting burglars and people charged with robbery who were found to be carrying handguns, knives or other dangerous objects, the hour of the morning that this investigation was taking place and the fact he was alone.

Officer Lyons parked his cruiser in front of the truck and as he did so the defendant approached and Christman came down from the cab. Officer Lyons had a brief conversation with both individuals concerning their presence there. The defendant explained that he and Christman had arrived in town earlier and found the company closed when they pulled up to deliver their load of wood, that they decided to wait there through the night in order to be able to make the delivery when the company opened in the morning,¹ that in the meantime they unhooked their load and went down the street to get something to eat, that they had returned to C.R. Wood a few minutes earlier and that just before the officer's arrival the defendant had gotten out of the cab to relax while Christman remained in the cab. Officer Lyons then asked the defendant and Christman for identification and if they had any proof of the load they were carrying. The defendant produced identification from his wallet. Christman said he would go up in the cab to get his wallet in order to produce identification. The defendant also responded that they did have papers concerning their cargo and suggested to Christman that he also get a clipboard while he was in the cab to establish that fact. At this point Officer Lyons exited the cruiser and instructed Christman not to reenter the cab. Christman nevertheless opened the door to the cab and reached for a clipboard located on the dashboard which, when Officer Lyons then exhibited some unease at these movements, he placed on the front fender of the truck. Officer Lyons then made the comment, ``Fellas, I'm feeling a little uneasy here," and said to the defendant, ``I'm going to pat you down for my own safety." As Officer Lyons began patting down the defendant, another officer arrived. During the patdown Officer Lyons felt what from his experience he knew to be a handgun in the defendant's right front pocket. After commenting to his fellow officer that he felt a handgun he removed a snub nose .38 handgun from the defendant's pocket.

¹ The cab contained a sleeping compartment.

Legal Discussion

Although the defendant argues that Officer Lyons did not have an articulable suspicion justifying an investigatory stop, *see* Motion to Suppress & 6, in fact the evidence which the defendant seeks to have suppressed was obtained as a consequence of the frisk of the defendant which was conducted during the police officer's investigation. Thus, the real issue is whether Officer Lyons had reasonable grounds for searching the defendant for weapons.

Both a "stop" and a "frisk" involve intrusions which fall within the Fourth Amendment's proscription against unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 16, 20 (1968). Whether a "stop" and "frisk" are reasonable depends on the circumstances. As the Supreme Court has stated:

[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

Id. at 21.

It was entirely reasonable for Officer Lyons to have approached the defendant and Christman in connection with his investigation of possible criminal behavior. Their presence at C.R. Wood at 2:30 a.m. near a trailer rig loaded with wood and a detached cab was clearly suspicious, especially so in light of Officer Lyons' knowledge of previous burglaries at this same site and elsewhere in the area. The Government justifies the ensuing weapons search of the defendant as one permitted under the rule articulated in *Terry v. Ohio* as follows:

[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or

that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 27 (citations omitted).

Officer Lyons made clear during his suppression hearing testimony that at the time he conducted the weapons search of the defendant he had an actual concern for his safety based on his belief that the defendant and/or Christman may have been armed. He pointed to the specific and articulable facts which led him to search the defendant: the suspicious circumstances he was investigating with the knowledge, gained from his experience as a police officer, that several businesses in the area had been burglarized, leading to his concern that a possible burglary involving the defendant and Christman was in progress; the defendant's large size and scruffy appearance; the hour of the night; the dimly lit area in which he found himself; the fact he was alone; his experience that burglars often carry handguns or other dangerous objects; and the movements of Christman in reaching into the cab of the truck despite his instruction not to do so. That his concern regarding his own safety in the circumstances described was objectively reasonable can not be gainsaid. His judgment is to be evaluated on the basis of the facts available to him "at the moment of the . . . search," and not otherwise. *Id.* at 22. Officer Lyons' grounds for believing that the defendant was armed and dangerous were at least as reasonable as were those of the police officer whose search for weapons was upheld in *Terry*.

For the foregoing reasons, I recommend that the motion to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 15th day of February, 1990.

David M. Cohen
United States Magistrate